

**Importer Liabilities under the
Toxic Substances Control Act (TSCA)**

Submitted by:

George R. Tuttle, III
George R. Tuttle Law Offices
One Embarcadero Center, Suit 730
San Francisco CA 94111
Phone (415) 986-8780
E-mail: george.tuttle.iii@tuttlelaw.com
Web : www.tuttlelaw.com

Importer Liabilities under the Toxic Substances Control Act (TSCA)

This article is intended to assist importers (and their legal counsel) who are not familiar with the Toxic Substances Control Act (TSCA) better understand their legal responsibilities, as it applies to the importation of chemicals and products made with or that incorporate chemical substances or mixtures.

I. Overview: The Toxic Substances Control Act

In 1976, Congress enacted the Toxic Substances Control Act (TSCA).¹ Under TSCA, the Environmental Protection Agency was granted broad authority to issue regulations designed to gather health/safety and exposure information on, require testing of, and control exposure to individual chemical substances, chemical mixtures, and articles. Title I of the Act requires EPA to:

- Establish an inventory of chemical substances existing in U.S. commerce (the list may be found on the Internet at: msds.ehs.cornell.edu/tscasrch.asp);
- Review “new” chemicals before such chemicals are introduced into commerce;
- Test existing chemicals for their effect on human health and the environment;
- Establish reporting and recordkeeping requirements for chemicals;
- Control substances that are determined to cause unreasonable risk to public health or the environment;
- Establish import and export requirements for chemicals, mixtures, and articles that contain chemicals that are subject to the provisions of the Act.

¹ The Toxic Substances Control Act (TSCA) of 1976; Oct. 11, 1976, [P.L. 94-469](#), [90 Stat. 2003](#), appears as [15 USCS § 2601](#) et seq. (1976). The Act has been amended several time to include additional provisions related to Asbestos Abatement (P.L. 99-519, October 1986), Indoor Radon Abatement (P.L. 100-551, October 1988), and Lead Based Paint Exposure (P.L. 102-550, October 1992).

Section 3 of Title I of TSCA broadly defines the term “manufacture” to include importation into the United States², thus, importers of new or existing chemical substances, mixtures, or articles containing a chemical substance or mixture have the same, or nearly the same notification, reporting, compliance, and recordkeeping obligations as a chemical manufacturers located in the United States.³

TSCA also created a shared enforcement responsibility between the EPA and the U.S. Customs Service, which at that time, was an agency under the responsibility of the U.S. Department of Treasury.⁴ Section 13 of the TSCA mandates that any chemical substance, mixture, or article containing a chemical substance or mixture be refused entry into the customs territory of the United States if: (a) it fails to comply with any rule in effect under TSCA, or (b) is offered for entry into the United States in violation of Sections 5, 6, or 7 of Title I of the Act.⁵

Section 13 also authorizes the Secretary of the Treasury together with the EPA administrator to implement regulations regarding the importation of chemical substances, mixtures, or articles containing a chemical substance or mixture. Finally, Section 13

² TSCA Section 3 defines the term “manufacture” to include: “import into the customs territory of the United States (as defined in general Headnote 2 of the Tariff Schedules of the United States), produce or manufacture.”

³ Introduction to the Chemical Import Requirements of TSCA, page 9. EPA Publication, June 1999. <http://www.epa.gov/oppt/import-export/pubs/importguide.pdf> Accessed January 2010.

⁴ At the time of enactment of TSCA in 1976, the then “U.S. Customs Service” was under the responsibility of the U.S. Department of Treasury. Effective March 1, 2003, Customs was renamed the Bureau of Customs and Border Protection and was part of the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1502, 116 Stat. 2135, 2308 (2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32, at 4 (2003). The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection. 72 Fed Reg. 20131 (Apr 23, 2007).

⁵ 15 U.S.C. § 2612. “Entry into Customs Territory of the United States.”

authorizes the Secretary of Treasury to require the posting of a bond equal to the value of such substance, mixture, or article that is imported, and to assess liquidated damages equal to the full value of the goods if there is a failure to return such substance, mixture, or article for cause to the custody of CBP when demanded.⁶ To facilitate compliance, both EPA and CBP have regulations^{7, 8} which provide that a certificate of compliance with TSCA must be submitted to CBP for each importation of chemicals subject to the Act.

Non-compliance with TSCA by importers can result not only in detained shipments and/or denied entry, but also substantial civil and/or criminal penalties.

II. TSCA Import Certificates of Compliance

A. General Requirements: Contents and Filing Requirements 19 C.F.R. §§ 12.121

Under regulations⁹ promulgated by U.S. Customs (CBP), importers must certify, at the point of entry, for each shipment either:

- (1) the chemical substances, mixtures, and articles being imported comply with all applicable rules and orders under TSCA Sections 5, 6, and 7, and are not offered for entry in violation of TSCA (a positive certification); or
- (2) the chemical substances, mixtures, and articles being imported are not subject to TSCA (a negative certification).

TSCA Import Certificates must currently accompany the filing of an entry or entry summary for each shipment containing chemical substances, mixtures, or articles

⁶ *Supra.*, 15 U.S.C. § 2612. Entry into customs territory of the United States.

⁷ *See* 20 C.F.R. § 707.20(b) and (c) “Chemical Substances Import Policy.”

⁸ *See* 19 C.F.R. §§ 12.118 through 12.127.

⁹ 19 C.F.R. § 12.121.

that are not otherwise exempt from TSCA import certification requirements, before the release of the goods.¹⁰

Certifications are required for all substances that are imported and are received by mail or commercial carrier, including those intended for research and development.¹¹

There are three types of TSCA Import Certificates: positive, negative, and blanket. As discussed below, one of these TSCA Import Certificates must accompany each applicable shipment, unless the chemical substance, mixture, or article is exempt.

TSCA Import certification statements may be preprinted, typed, or stamped on the invoice for each shipment, or may be provided as a separate document that is attached to such invoice.¹² Import certificates must be signed by means of an authorized facsimile signature. Parties authorized to sign certificates are the importer or the authorized agent of the importer.¹³ A foreign manufacturer or exporter would not be authorized to sign a certification unless it is also acting as “importer or record”.¹⁴

B. Certificates Must Be Based on Actual Knowledge

EPA expects that in most cases the TSCA import certification will be based upon actual knowledge of the importer.¹⁵ EPA recognizes, however, that sometimes importers may not have actual knowledge of the chemical composition of imported mixtures. In these situations, EPA expects the importer to identify the chemical constituents of the

¹⁰ 19 C.F.R. § 12.121(a)(2). See also CBP Ruling H054764, dated ____

¹¹ Introduction to the Chemical Import Requirements of TSCA., page 6. EPA Publication, June 1999. <http://www.epa.gov/oppt/import-export/pubs/importguide.pdf> Accessed January 2010.

¹² *Id.*

¹³ 19 C.F.R. § 12.121(a)(1).

¹⁴ Toxic Substances Control Act: A Guide for Chemical Importers/ Exporters, EPA 5601-91-001, April 1991.

¹⁵ 40 C.F.R. § 707.20(c)(1)(iii).

shipment by contacting another party to the transaction, such as the foreign manufacturer or supplier. This party should be able to identify the components of the mixture, or at least state whether the substances comply with TSCA. The greater the effort an importer makes to learn the identities of the imported substances and their compliance with TSCA, the smaller the chance of committing a violation by importing a non-complying shipment.¹⁶ If a shipment is ultimately determined to have violated TSCA, the good faith efforts of the importer to verify compliance, as evidenced by documents contained in his files may obviate or mitigate the assessment of a civil penalty under section 16 of TSCA.¹⁷

C. Positive and Negative TSCA Import Certificates

A positive TSCA import certification means that the importer has determined that the chemical substance or mixture that is being imported is subject to TSCA and the chemical substance or mixture complies with the requirements of sections 5, 6, and 7 of TSCA; whereas, a negative TSCA import certification means that the importer has determined that the chemical substance or mixture that is being imported is not subject to TSCA.¹⁸ As discussed below, no certification is required for manufactured articles or for tobacco or tobacco products.¹⁹ Certifications may also be required for chemical substances or mixtures that are a part of or imported with manufactured articles.²⁰

¹⁶ Id.

¹⁷ Id.

¹⁸ 40 C.F.R. § 707.20(b) and 19 C.F.R. § 12.121(a).

¹⁹ Introduction to the Chemical Import Requirements of TSCA, page 4. EPA publication, June 1999. <http://www.epa.gov/oppt/import-export/pubs/importguide.pdf> Accessed January 2010.

²⁰ 19 CFR § 12.121(c).

D. The Positive TSCA Certificate

An importer certifies that either the chemical substance or mixture is not subject to TSCA, or if is, that it complies with the requirements of sections 5, 6, and 7 of TSCA.²¹

TSCA Section 5 - Pre-manufacture Notice (PMN). Unless exempt, chemical substances imported into the United States must be listed on the TSCA Inventory List. Section 5 addresses how new chemical substances are added to the list through a Pre-manufacture Notice (PMN) or how existing chemicals with a significant new use (SNU) are reported. The importer is certifying that the chemical substance is on the TSCA Inventory List of Chemical Substances and that it is not being imported for a significant new use that has not otherwise been reported, and that the product complies with any consent order regarding use, marking, or labeling of the product.

TSCA Section 6 covers the regulation of selected chemical substances and mixtures that EPA has determined presents an unreasonable risk of injury to the health or environment. The importer is certifying that the chemical substance is not a regulated or restricted chemical substance, such as PCBs or asbestos containing products.

TSCA Section 7 - Imminent Hazards. Importer are required to comply with any judicial orders that may be issued under Section 7 of TSCA for products which EPA has determined are imminently hazardous, and/or for other relief against any person who manufactures (imports), processes, distributes in commerce, uses, or disposes of an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture.

²¹ 40 C.F.R. § 707.20(c)(ii).

E. Paper Certificates vs. Electronic Statements

If a TSCA import certificate is required, it must be physically submitted to CBP at the Port of Entry or submitted using accepted electronic means. While the vast majority of customs entries are filed using electronic submission provisions of 19 CFR Part 143 of the Customs Regulations, submission of the paper declaration is still required at this time.²² When customs entries are filed using the Remote Entry Prototype, the entry filer is prompted as to whether they have a TSCA Import certificate. The entry filer then completes the electronic prompt and CBP may choose to request the document be submitted for inspection.

CBP had posted on its website CSMS #99-001068, 12/2/1999, which concerns the "Toxic Substances Control Act Certification Requirements" under the Remote Location Filing Prototypes and Electronic Invoice Program."² This notice provides that, under the TSCA and 19 C.F.R. 12.118 to 12.127, "any chemical substance, mixture, or article which fails to comply with any rule, order or civil action under TSCA" shall be refused entry. With the passage of the Customs Modernization Act, Customs has been striving to accept completely electronic entry packages for as many commodities as possible. For electronic entries filed under the RLF (remote location filing) and EIP (electronic invoice program) programs, Customs and EPA will accept the TSCA certification in the transmission of the electronic invoice as meeting the TSCA certification requirement if completed as instructed in CSMS #99-001068. For each chemical substance and/or

²² In a Notice of Proposed Rule Making, dated January 9, 1990 (55 Fed Reg. 738), Customs proposed to amend section 12.121 to allow for the electronic certification of TSCA declarations when electronic entry filing was used. In its final Notice of Rule Making (T.D. 00-13)(34 Cust. Bull & Dec. 97) Customs dropped this proposal "in favor of the status quo."

mixture, the EIP and RLF filer is required to transmit, at the time of entry, a code²³ as well as the name of the authorized individual as an electronic signature in the commercial description field of the C35 record. Entries filed in paper format shall continue to be required to follow the current policy.

F. Using Blanket TSCA Certificates

Customs' regulations also provide for the use of blanket certificates.²⁴ A blanket TSCA certificate may be used in lieu of filing separate certificates for each chemical shipment; the blanket certificate, however, is not acceptable until it is approved by the Customs Director at the Port of Entry.²⁵ The blanket certificate will only be approved if the Customs Director considers the importer and Customs Broker to be reliable.²⁶ If approved, the blanket certificate is valid for up to 1 year, unless revoked; separate certifications must be submitted and approved for substances that are subject to TSCA and for those that are not.²⁷ As noted previously, each port of entry must have an approval of certifications for shipments transported through its territory.

Blanket certificates must be filed on the letterhead of the certifying firm and list the products covered by the certificate, including the name of the product and its Harmonized Tariff number to the subheading level, the identity of the foreign supplier (name and address), and be signed by an "authorized" person.²⁸ When a blanket certificate is used, the importer must include a statement on the invoice accompanying

²³ There are two codes: "TSCA +" and "TSCA-". These codes are self explanatory.

²⁴ 19 C.F.R. §§ 12.121(a)(2)(ii).

²⁵ Id.

²⁶ Id.

²⁷ 19 C.F.R. §§ 12.121(a)(2)(ii)(B).

²⁸ 19 C.F.R. §§ 12.121(a)(2)(ii)(A).

the shipment that the goods are covered by a blanket certification and incorporating it by reference.²⁹

III. Chemical Substances, Mixtures and Articles Subject To TSCA Import Certificate Requirements

Articles that are made from chemical substances and mixtures, or otherwise contain them are generally exempt from import certificate requirements;³⁰ however, products that are fluids or particles are not considered “articles” for purposes of the TSCA certification requirements.³¹ The requirements also apply to the importation of residual chemicals that remain in otherwise “empty” reusable containers.³²

The greatest challenge that importers face is not knowing whether the article they are importing is a chemical substance or mixture that is subject to TSCA. When products are imported, they are classified according to the rules associated with the Harmonized Tariff Schedules of the United States (HTSUS).³³ The Harmonized Tariff Schedules, however, do not contain TSCA identifier information such that an importer would otherwise know that the item imported requires a TSCA certificate. While Customs and Border Protection is the only agency that can provide legally binding advice on the classification of imports, they will refer importers to the EPA for a determination as to whether merchandise may be subject to the requirements of the TSCA.

²⁹ 19 C.F.R. § 12.121(a)(2)(ii)(C).

³⁰ 19 C.F.R. § 12.121(b).

³¹ 19 C.F.R. § 12.120.

³² EPA Opinion Letter Dated March 4, 2010 to George R. Tuttle, III, Tuttle Law Offices.

³³ The United States International Trade Commission (USITC) (Office of Tariff Affairs and Trade Agreements) is responsible for publishing the HTSUSA. The HTSUSA provides the applicable tariff rates and statistical categories for all merchandise imported into the United States. The HTSUS is accessible at <http://www.usitc.gov/tata/hts/bychapter/index.htm>

A. Exclusions and Exemptions

TSCA Section 3 states that the term “chemical substance” does not include any of the following:

- “Tobacco or any tobacco product,”
- “Pesticides” under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
- A “source material,” “special nuclear material,” or “byproduct material” under the Atomic Energy Act of 1954, (AEA) and regulations.
- Firearms and ammunition subject to Section 4181 of the Internal Revenue Service Code of 1954.
- A “food,” “food additive,” “drug,” “cosmetic,” or “device” defined in Section 201 of the Food, Drug, and Cosmetic Act (FDCA).

With the exception of tobacco or tobacco products, the above listed items will require a **negative** TSCA certification. No certification is required for tobacco or tobacco products.³⁴

B. Treatment of Manufactured Articles for TSCA Import Certifications

TSCA’s Section 13 Import Certification is not currently required for imported manufactured articles.³⁵ The term “manufactured article” is not defined under TSCA, but under various regulations implemented by EPA³⁶, with the definition adopted by CBP. A manufactured article is defined in the Customs regulations³⁷ as an article that:

- (i) is formed to a specific shape or design during manufacture,

³⁴ Introduction to the Chemical Import Requirements of TSCA, EPA Pub., June 2008. EPA 305-B-08-001.

³⁵ Id., at page 2 and 3.

³⁶ EPA Proposed Policy Statement for Chemical Substances, 45 Fed. Reg. 79726. December 1, 1980. Introduction to the Chemical Import Requirements of TSCA, EPA Pub., EPA 305-B-08-001 June 2008, page 3.

³⁷ 19 C.F.R. § 12.120(a)(1).

(ii) has end use functions dependent in whole or in part upon its shape or design during the end use, and

(iii) has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article.

Allowable changes of composition are those which result from a chemical reaction that occurs upon the end use of other chemical substances, mixtures, or articles such as: adhesives, paints, miscellaneous cleaners or other household products, fuels and fuel additives, water softening and treatment agents, photographic films, batteries, matches, and safety flares in which the chemical substance manufactured upon end use of the article is not itself manufactured for distribution in commerce or for use as an intermediate; however, fluids and particles are not considered articles regardless of shape or design.³⁸ It is also important to note that chemical substances and mixtures are considered to be imported as part of an article only if the substances or mixtures are not intended to be removed and/or released from the article, and they have no end use or commercial purpose separate from the article of which they are a part.³⁹ Therefore, chemical substances and mixtures put up and packaged for retail sale are still subject to TSCA certification requirements.

³⁸ 19 C.F.R. § 120(a) definition of the term “article”.

³⁹ See 42 FR 64583 (December 23, 1977).

C. TSCA's Questions and Answers

The EPA has issued limited guidance to the importing community regarding the type of products that are subject to TSCA import certification requirements.⁴⁰ For example:

QUESTION #4 Are metallurgical Intermediates classified as chemical substances or articles?

ANSWER: If an item is manufactured in a particular shape for the purpose of shipping convenience and the shape of the item has no function in the end use, it is not considered an article. Thus, items such as metal ingots, billets, and blooms are chemical substances, require TSCA certification, and are subject to PMN requirements.

QUESTION #6 Is waste imported for disposal in drums and not removed from the drums considered an article?

ANSWER: No, such waste is not an article; it is a bulk chemical and requires a positive certification. See, however, questions 70 and 71.

QUESTION #12 Do mixtures such as paints, cleaners, and the like have to be certified?

ANSWER: Yes, the procedure outlined in the answer to the preceding question must be followed and a positive certification signed.

QUESTION #13 Do the certification requirements apply to shipments of final products that are chemical mixtures? For example, would the rule apply to a shipment of cartons of carburetor cleaner?

ANSWER: Yes, certification is required for shipments of final products that are chemical mixtures.

IV. Enforcement and Compliance

TSCA certificates are a condition of admission of the product into the United States,⁴¹ as such, Customs is required to detain and refuse entry of any shipment that does

⁴⁰ Toxic Substances Control Act: A Guide for Chemical Importers/ Exporters, EPA 5601-91-001, April 1991.

⁴¹ U.S. Customs Service, Final Rule: Importation of Chemicals Subject To the Toxic Substances Control Act. T.D. 00-13, 34 Cust. Bull. And Dec. 97, 99.

comply with TSCA, or does not have a TSCA certification when otherwise required.⁴²

For goods that have been released prior to a determination of admissibility, CBP may, under limited circumstances, demand their redelivery. If redelivery is not complied with, CBP may assess liquidated damages.

A. Customs Bonds, Notices of Redelivery & Liquidated Damages

As a pre-condition to importing, an importer must obtain a general importation and entry bond⁴³, or post a cash deposit equal to the value of the merchandise.

Typically, the party to whom the bond is issued (also referred to as the “principal”) is the importer of the goods. If the importer agrees to comply with all of the conditions specified in the general import bond, Customs agrees that it will release the goods for admission. The bond acts as security for the performance of the obligations by the importer. The conditions of importation are found in Section 113.62 of the Customs regulations, and include promises to:

- (a) Pay all duties, taxes, and charges found owing by Customs;
- (b) Make or complete entry in the time required;
- (c) Produce documents and evidence, as requested;
- (d) Redeliver merchandise to Customs
- (e) Rectify any non-compliance with provisions for admission of goods.

If the importer or Customs broker breaches any one of the conditions of the entry bond, the importer is subject to liquidated damages in the amount of the demand; however, the amount of the demand may not exceed the amount of the bond.

⁴² 19 C.F.R. § 12.122(a)(3); 15 U.S.C. § 2612.

⁴³ There are single transaction and multi-transaction bonds available for imports. 19 CFR § 113

B. The Agreement to Redeliver Merchandise

By law, Customs has an obligation to determine the admissibility of merchandise before it is released from Customs custody.⁴⁴ As a practical matter, Customs does not have the resources to examine all merchandise at the time of arrival. Customs may, therefore, release merchandise prior to a determination that all applicable legal requirements have been met.⁴⁵ In exchange, the importer agrees to redeliver the merchandise back to Customs should Customs subsequently determine that the shipment should be examined, or if Customs subsequently determines that the goods are not admissible.

A demand for redelivery to Customs custody is a form of "constructive exclusion" of the goods. It is in reality no different than a decision to exclude merchandise from entry or delivery. The principal difference is the time when the decision is made by Customs. The decision to exclude is made at the time an entry is attempted. A demand for redelivery is made after the goods have already entered but Customs has subsequently determined that the goods should not have been admitted. *See* S. Rep. No. 466, 96th Cong., 1st Sess. 7 (1979).⁴⁶

A failure to redeliver all of the merchandise within the time allowed will result in the assessment of liquidated damages. When a demand for the return of goods is not complied with, liquidated damages may be assessed in an amount equal to the value of

⁴⁴ 19 U.S.C. § 1499(a). Section 1499(a) requires Customs to retain custody of merchandise until it has been inspected, appraised, and examined; that it has been "truly and correctly invoiced," and been found to comply with the requirements of the laws of the United States.

⁴⁵ Customs may release the goods without physical examination, 19 C.F.R. § 151.2(a)(2) (1999), and Customs may later request samples or additional examination of goods which have already been released, 19 C.F.R. § 151.11 (1999).

⁴⁶ Cited in United States v. Toshoku Am., Inc., 11 CIT 641, 670 F. Supp. 1006, 1010 (1987), *aff'd* 7 Fed. Cir. (T) 104, 107 (1989).

the merchandise not returned, or three times the value of the merchandise not returned if the merchandise is restricted or prohibited merchandise⁴⁷.

C. Limitations on the Ability of Customs to Demand Redelivery

A redelivery notice may never be issued after liquidation of an entry becomes final. United States v. Utex International Inc., 857 F.2d 1408 (Fed. Cir. 1988). Liquidation can take up to one year.⁴⁸ There are, however, further limitations on the right of Customs to demand redelivery. Section 141.113 of the Customs Regulations authorizes CBP to recall merchandise that has been released from its custody. The provision provides that such demands must be made “promptly” following the release of the goods:

§ 141.113 Recall of merchandise released from Customs custody.

(d) Other merchandise not entitled to admission. If at any time after entry the port director finds that any merchandise contained in an importation is not entitled to admission into the commerce of the United States for any reason not enumerated in paragraph (a)[⁴⁹], (b)[⁵⁰] or (c)[⁵¹] of this section, he shall promptly demand the return to Customs custody of any such merchandise which has been released.

⁴⁷ Articles subject to import restrictions are identified in Part 12 of the Customs regulations (19 CFR).

⁴⁸ 19 U.S.C. § 1504.

⁴⁹ Subsection (a) relates to the importation of merchandise not legally marked..

⁵⁰ Subsection (b) relates to the importation of textiles and textile products. For purposes of determining whether the country of origin has been accurately represented to Customs, the release from Customs custody of any such product shall be deemed conditional during the 180-day period following the date of release.

⁵¹ Subsection (c) relates to establishment of a conditional release period for any food, drug, device, or cosmetic imported pursuant to section 801(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 381(a)), as amended.

The interpretation of this provision has been thoroughly considered by CBP (e.g., HQ 227686 of August 12, 1999; HQ 224584 of July 6, 1994; HQ 224872 of July 5, 1994 and HQ W968383 of March 2, 2007.). The term "promptly" as it appears in § 141.113 has been interpreted to mean either:

- 1) no later than thirty days after the date the merchandise is released, if there is no occurrence establishing a different conditional release period; or
- 2) if there is an occurrence establishing a different conditional release period (e.g., 19 C.F.R. 151.11), no later than thirty days after the end of that period (e.g., if information or a sample is requested, within thirty days from the date of receipt by CBP of the information or sample)

See HQ 951300 of October 7, 1992; HQ 223535 of September 21, 1992; and HQ 088904 of February 19, 1992). Customs, in discussing the establishment of a conditional release period, stated in C.S.D. 90-99, dated June 28, 1990:

For purposes of 19 CFR 113.62(d)), we consider a request for a sample on a Customs Form (CF) 28, Request for Information, or other appropriate form issued by Customs no later than 30 days after the date the merchandise is released, to establish a conditional release period. The beginning of the conditional release period is the date the CF 28 is issued; the end of the conditional release period is the date Customs receives the sample.

This position was reiterated in Ruling 114511 of October 30, 1998 and HQ 114819 of October 8, 1999, wherein it was said that for the purpose of a Notice to Redelivery, Customs must provide notice to an importer with respect to the establishment of a conditional release period, such as the issuance of a CF 28 or other appropriate form. Therefore, in the absence of a validly noticed conditional release period, Customs has 30 days from the date of release to issue a Notice of Redelivery. See, U.S. v. So's USA, 23 C.I.T. 605 (1999), citing Customs Service Decision (C.S.D.) 90-99, 24 Cust. Bull. 574, 577 (1990).

A demand for redelivery is subject to an administrative protest.⁵² In the absence of a timely filed protest, the importer will lose its right to contest the validity of the demand for redelivery.⁵³ Assuming the importer has not challenged the demand for redelivery or the challenge was unsuccessful, and it has not otherwise complied with such request, CBP may issue the Demand for Liquidated Damages. An importer has the right to petition for the remission or mitigation of the liquidated Damage assessment.⁵⁴ Under regulations issued by Customs,⁵⁵ an importer has the right to petition for the remission or mitigation of the liquidated Damage amount, but the petition must generally be filed within 60 days of the date of the notice of assessment of liquidated damages.⁵⁶ Depending on the amount involved, the petition may be acted on by the issuing port, or may be referred to Customs Headquarters.⁵⁷ The Office of Rulings and Regulation, International Trade Division, decides petitions and supplemental petitions in cases where the liquidated damages claim is greater than \$100,000.

CBP has also issued several guidance documents on dealing with Liquidated Damage cases.⁵⁸ Pursuant to 19 U.S.C. 1623, Customs may cancel any bond or a claim for liquidated damages made against such a bond upon payment of a lesser amount or

⁵² 19 U.S.C. § 1514(a)(4).

⁵³ Id.

⁵⁴ 19 U.S.C. § 1618 and 19 C.F.R. § 172.1.

⁵⁵ See 19 C.F.R. Part 172.

⁵⁶ Id.

⁵⁷ 19 C.F.R. Part 172.11 and -.12.

⁵⁸ CBP Informed Compliance Publication: Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages February 2004; and *Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages*, February 2004.

penalty, or upon such other terms and conditions as Customs deems sufficient. All guidelines for bond cancellation are published.⁵⁹

D. Other Customs Related Enforcement Measures

Failure to have a certificate at the time of entry can be treated as a recordkeeping violation under 19 USC § 1509(a)(1)(A) (and subject to a \$10,000 penalty) and/or a false statement penalty under 19 USC 1592 if the importer omits to file the certification or the certification is incorrect and the incorrect information is material.

1. Recordkeeping Penalties

Section 509(a)(1)(A) of the Tariff Act of 1930 (19 U.S.C. § 1509 (a)(1)(A)) as amended by section 615 of title VI of the North American Free Trade Agreement Implementation Act (generally referred to as the “Customs Modernization Act”) requires the maintenance and production of a record if “such record is required by law or regulation for entry of merchandise (whether or not required presentation at the time of entry).” Section 509 was further amended by adding a new subsection (e) which requires Customs to identify and publish a list of records or entry information that is required to be maintained and produced under section 509 (a)(1)(A), which is commonly referred to as “the (a)(1)(A) list”. The “(a)(1)(A) list” was published as Treasury Decision 96-1 in the Customs Bulletin, dated January 3, 1996. The “(a)(1)(A)” list was republished and slightly amended in T.D. 98-56.⁶⁰ The TSCA import certificate is identified on the “(a)(1)(A)” list. Section 509 provides that if a person fails to comply with a lawful demand for information under subsection (a)(1)(A) such person may be subject to a penalty. The amount of the penalty is determined depending on whether the failure to

⁵⁹ See *Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages*, February 2004. Page 31.

⁶⁰ 19 C.F.R. Part 163, Appendix A; Interim “(a)(1)(A)” list.

comply is a result of willful failure to maintain, store or retrieve information or whether the failure to comply is a result of negligence.⁶¹ The Mod Act requirements for (a)(1)(A) records are for the preparation, maintenance and production of required information. 19 U.S.C. § 1509(g)(2) provides for penalties for the failure to comply with a lawful demand for (a)(1)(A) records. The penalty for a negligent violation of 19 U.S.C. § 1509(a)(1)(A) is not to exceed \$10,000 or 40% of the appraised value of the merchandise and a willful violation is not to exceed \$100,000, or an amount equal to 75 percent of the appraised value of the merchandise, whichever amount is less.

Section 1509(g)(2) does not establish penalties for inaccurate information assuming that the pertinent record is produced. Information presented to Customs which is inaccurate is not a record keeping error, but an error of the affected Customs program, and may result in a penalty under 19 U.S.C. § 1592, which is discussed below.

2. Civil Penalties for False Statements & Omissions

19 U.S.C. § 1592 provides for penalties against any person who: by fraud, gross negligence, or negligence, enters or introduces (or attempts to enter or introduce) any merchandise into the commerce of the U.S., by means of any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or any omission which is material (i.e., the falsity has the potential to alter the classification, appraisement, or admissibility of merchandise). Errors and inaccuracies in a TSCA import certificate can therefore expose an importer to penalties under 19 USC § 1592.

⁶¹ 19 USC 1509(g)(2).

Penalties 19 USC § 1592 will vary based on the level or culpability. Penalties for a negligent or grossly negligent violation of § 1592 can be equal to 20 to 40% of the value of the shipment.⁶² Penalties for an intentional violation can be up to an amount not to exceed the domestic value merchandise.⁶³ Civil penalties assessed under § 1592 are subject to petition for mitigation or remission.⁶⁴

3. Introductions Contrary to Law - Seizure under 19 U.S.C. 1595a(c)

19 U.S.C. § 1595a(c) is the primary seizure and forfeiture statute Customs uses to enforce a myriad of civil laws – both Customs laws and laws and regulations of other agencies. Many laws define what constitutes prohibited merchandise or behavior but do not provide a remedy to be enforced regarding that prohibited merchandise or as a consequence of that behavior. Section 1595a(c), on the other hand, actually provides for the seizure and forfeiture of the violative property. Subsection 1595a(c)(2) provides that merchandise may be seized and forfeited if its importation or entry is subject to any restriction or prohibition that is imposed by law relating to health, safety, or conservation, and the merchandise is not in compliance with the applicable rule, regulation or statute. As in the case of liquidated damages, recordkeeping penalties, and false statement penalties, a seizure under 19 USC 1595a(c) is subject to a petition for remission or mitigation under 19 USC § 1618. For a first offense, remission may be granted upon payment of: 10 – 30% of the dutiable value of the seized goods; for a second offense remission may be granted upon payment of: 30 –50% of the dutiable value of the seized. For

⁶² 19 U.S.C. § 1592.

⁶³ Id.

⁶⁴ See 19 C.F.R. Part 171. Fines, Penalties and Forfeitures.

a third and subsequent offenses, remission may be granted upon payment of 50 -80% of the dutiable value of the seized goods.⁶⁵

V. Additional Resources

You can find information on import requirements for new and existing chemicals subject to TSCA on their website at:

-- <http://www.epa.gov/compliance/monitoring/programs/tsca/importexport.html>

-- <http://www.epa.gov/oppt/import-export/index.html>

-- <http://www.epa.gov/oppt/import-export/pubs/sec13.html>

Information can also be found in the EPA publication, "Introduction to the Chemical Import Requirements of the Toxic Substances Control Act (PDF)"

www.epa.gov/compliance/resources/publications/monitoring/tsca/importguidejune2008.pdf (11 pp., 97.7 kb)

-- 42 Fed. Reg. 64583 (Dec. 23, 1977).

⁶⁵ CBP Informed Compliance Publication: *Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages* February 2004. 1595a(c) violations, page 15.